

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

OSCAR GARCIA-VASQUEZ,

Defendant.

NO. CR-03-2245-RHW

**ORDER DENYING MOTION TO  
MODIFY AND CORRECT  
SENTENCE PURSUANT TO  
TITLE 28 U.S.C. § 2255**

Before the Court is Defendant's Petition to Vacate, Set Aside, or Correct his Sentence in Federal Custody under 28 U.S.C. § 2255 (Ct. Rec. 59), filed May 12, 2005. Defendant pleaded guilty to Distribution of a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1), and on October 13, 2004, was sentenced to 70 months of incarceration, 3 years of supervised release, a \$100 special penalty assessment, and a restitution payment of \$530 (Ct. Rec. 57).

**DISCUSSION**

Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set aside, or correct his or her sentence on the grounds that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was not authorized by law; or (4) issues of collateral attack. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no

1 relief, the court shall cause notice thereof to be served upon the United States  
2 attorney.” 28 U.S.C. § 2255. Pursuant to Rule 4(b), of the Rules Governing  
3 Section 2255 Proceedings in the United States District Courts, the Court may, *sua*  
4 *sponte*, dismiss the motion if “it plainly appears from the face of the moving party .  
5 . . that the movant is not entitled to relief” in district court.

6 Petitions filed under § 2255 have a 1-year period of limitation. 28 U.S.C.  
7 § 2255. The limitation period runs from the latest of: (1) the date on which the  
8 judgment of the conviction becomes final; (2) the date on which the motion is  
9 removed, if the movant was prevented from making a motion by governmental  
10 action; (3) the date on which the right asserted is recognized by the Supreme Court,  
11 if such right is retroactively applicable to cases on collateral review; or (4) the date  
12 on which the facts supporting the claim could have been discovered through due  
13 diligence. *Id.* Defendant was convicted on October 13, 2004, and filed this  
14 petition on May 12, 2005. Thus, Defendant’s petition is timely under part one of  
15 the statute.

16 Defendant is asserting that (1) his constitutional rights under the Sixth  
17 Amendment were violated because of ineffective assistance of counsel; and  
18 (2) that he was sentenced above the statutory maximum as a result of recent  
19 Supreme Court decisions (Ct. Rec. 59). Defendant asks the Court for a  
20 modification and correction of his sentence pursuant to 28 U.S.C. § 2255. In  
21 reviewing Defendant’s § 2255 petition, it is clear that Defendant is not entitled to  
22 relief.

### 23 **I. Sixth Amendment Right to Effective Assistance of Counsel**

24 Defendant contends that his sentence was imposed in violation of his Sixth  
25 Amendment right to effective assistance of counsel (Ct. Rec. 59). Defendant  
26 contends that his counsel misrepresented the conditions of his plea agreement. *Id.*  
27 Defendant also argues that his counsel failed to provide the Court with important  
28 mitigating evidence at sentencing that could have lead to downward departures. *Id.*

1 Specifically, Defendant asserts his counsel failed to present evidence regarding:  
2 (1) aberrant behavior; (2) his status as a deportable alien; (3) early disposition; and  
3 (4) Defendant's minor participation in concerted activity. *Id.*

4 To establish ineffective assistance of counsel, Petitioner must show that  
5 counsel "made errors so serious that counsel was not functioning as the 'counsel'  
6 guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466  
7 U.S. 668, 687 (1984). Counsel's representation must fall below an objective  
8 standard of reasonableness. *Id.* at 688. Under the two-prong test, Defendant must  
9 establish both that his lawyer's performance was deficient and that the deficient  
10 performance prejudiced his defense. *Id.* at 687. This test is also applicable when a  
11 defendant challenges the validity of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58  
12 (1985).

13 A deficient performance prejudices a defense if there is "a reasonable  
14 probability that, but for counsel's unprofessional errors, the result of the  
15 proceeding would have been different." *Strickland*, 466 U.S. at 694; *Hill*, 474 U.S.  
16 at 59. Disagreement with a strategic or tactical decision of counsel is an  
17 insufficient basis for a claim of ineffective assistance. *See Guam v. Santos*, 741  
18 F.2d 1167, 1169 (9th Cir. 1984). There is a strong presumption that counsel's  
19 conduct falls within the wide range of reasonable professional assistance or what  
20 might be considered sound strategy. *Strickland*, 466 U.S. at 689.

#### 21 **A. Misrepresentation of Condition of Plea**

22 Defendant asserts that his counsel misrepresented the conditions of his plea  
23 agreement (Ct. Rec. 59). Defendant contends that since he was not properly  
24 advised as to the ramifications of his guilty plea, his counsel performed deficiently.  
25 *Id.* Because Defendant sought a plea agreement that would not result in a long  
26 prison sentence, he believes his counsel was ineffective in reaching the resultant  
27 agreement.

28 The longstanding test for determining the validity of a guilty plea is

1 “whether the plea represents a voluntary and intelligent choice among the  
2 alternative causes of action open to the defendant.” *Hill*, 474 U.S. at 58.  
3 A defendant who pleads guilty upon the advice of counsel may only attack the plea  
4 by showing that the advice he received from counsel was not within the range of  
5 competence demanded of attorneys. *See Tollett v. Henderson*, 411 U.S. 258, 267  
6 (1973). The two-part standard in *Strickland* applies to guilty pleas; thus,  
7 Defendant must establish that his counsel’s performance was deficient and that the  
8 deficient performance prejudiced his defense. *Hill*, 474 U.S. at 59. To satisfy the  
9 latter requirement, Defendant must show that, absent his counsel’s  
10 ineffectiveness, there is a reasonable probability that he would not have pleaded  
11 guilty  
12 and would have insisted on going to trial. *Id.*

13 In the case at hand, Defendant was specifically asked whether any promises  
14 were made to him for pleading guilty at his sentencing hearing. At the change of  
15 plea hearing, Defendant was informed of the consequences of pleading guilty.  
16 Defendant was specifically asked by the Court whether “anyone made any  
17 promises to get [him] to plead guilty other than those contained in [his] plea  
18 agreement” (Ct. Rec. \_\_\_\_). Defendant denied that any promises were made to him  
19 for entering a guilty plea. *Id.* Under these circumstances, Defendant was not  
20 misrepresented; he spoke for himself and was well informed of the penalties  
21 associated with the guilty plea. *See id.*

## 22 **B. Failure to Provide Mitigating Evidence at Sentencing**

23 Defendant asserts that his counsel’s failure to present all the arguments  
24 possible to mitigate his sentence amounts to a deficient performance of counsel  
25 (Ct. Rec. 59). Defendant cites four arguments that could have been argued in his  
26 defense to mitigate his sentence. *Id.* Each argument is meritless or was argued by  
27 counsel, as stated in further detail below.

### 28 **1. Aberrant Behavior**

1 Defendant asserts he is entitled to a downward departure for aberrant  
2 behavior, and his counsel failed to pursue such action (Ct. Rec. 59). Defendant is  
3 correct in asserting that his counsel did not seek a downward departure for aberrant  
4 behavior (Ct. Recs. 48 & 52). His counsel's decision not to seek this departure,  
5 however, was not deficient because Defendant did not qualify for such a departure.

6 The Ninth Circuit has looked to "the totality of the circumstances in  
7 determining whether there were single acts of aberrant behavior by the defendant  
8 that justify a downward departure." *United States v. Takai*, 941 F.2d 738, 743 (9th  
9 Cir. 1991). There is an aberrant behavior spectrum that determines whether this  
10 mitigating factor should be applied. *United States v. Dickey*, 924 F.2d 836, 839  
11 (9th Cir. 1991) (finding that a man who had stolen cash dumped in his lap  
12 warranted a finding of aberrant behavior, while a defendant who engaged in a  
13 check-kiting scheme over a period of at least 15 months did not engage in aberrant  
14 behavior). Absence of prior convictions is not enough to show that the act in  
15 question was single and aberrant. *Takai*, 941 F.2d at 743. Furthermore, courts  
16 should not apply this departure to all first-time offenders because the Guidelines  
17 already adjust sentences based on a defendant's criminal history. *Dickey*, 924 F.2d  
18 at 838.

19 Here, Defendant's counsel was not deficient in concluding that Defendant's  
20 circumstances did not warrant a downward departure for aberrant behavior.  
21 Defendant sold a large amount of cocaine and methamphetamine to undercover  
22 agents on six separate occasions, spanning three months (Ct. Rec. 45).  
23 Defendant's involvement in the distribution had all the markings of a continuous,  
24 planned operation. While Defendant's actions may not reach the high-culpability  
25 end of the spectrum, they certainly do not demonstrate aberrant behavior. Thus,  
26 Defendant's constitutional rights were not violated when Defendant's counsel did  
27 not pursue this action.

## 28 2. Status as Deportable Alien

1 Defendant contends his counsel was deficient in his pursuit of a downward  
2 departure as a consequence of his status as a deportable alien (Ct. Rec. 59).  
3 Defendant asserts that he should have been granted a two-point downward  
4 departure at sentencing because of his deportable status. *Id.*

5 Defendant is correct in arguing that district courts have legal discretion to  
6 depart downward because of a defendant's status as a deportable alien. *See United*  
7 *States v. Martinez-Ramos*, 184 F.3d 1055, 1057 (9th Cir. 1999). The Ninth Circuit  
8 has found that a court may depart based upon concession of deportability if such  
9 concession provides "an articulate benefit to the government or a colorable, non-  
10 frivolous defense to deportation." *United States v. Rodriquez-Lopez*, 198 F.3d 773,  
11 777 (9th Cir. 1999).

12 Here, Defense counsel's performance was not deficient. Defense counsel  
13 made the argument for a downward departure based on Defendant's concession to  
14 deportation (Ct. Rec. 52). The argument specifically stated that deportation would  
15 "benefit the government by allowing it to conserve valuable resources." Therefore,  
16 Defendant's counsel attempted to mitigate the sentence by identifying "an  
17 articulate benefit to the government." *Rodriquez-Lopez*, 198 F.3d at 777. Thus,  
18 although the Court ultimately denied Defendant's motion for downward departure,  
19 it was not the result of deficient counsel.

### 20 **3. Early Disposition**

21 Defendant contends that his counsel was deficient because he failed to seek a  
22 downward departure for early disposition under U.S.S.G. § 5K3.1 (Ct. Rec. 59).  
23 Defendant believes that because he pleaded guilty and cooperated fully with the  
24 United States, he was entitled to a two-point downward departure for early  
25 disposition (Ct. Rec. 59).

26 Defendant incorrectly argues that his counsel was deficient in this regard.  
27 Under § 5K3.1, only the United States can move for an early disposition program  
28 to provide a defendant with a downward departure. U.S.S.G. § 5K3.1 ("[u]pon

1 motion of the government, the court may depart downward . . . pursuant to an early  
2 disposition program . . .”). Defendant’s counsel could not have been deficient  
3 because he lacked the legal authority to initiate such a motion.

#### 4 **4. Minor Participation**

5 Defendant contends that he played a minor role in concerted activity (Ct.  
6 Rec. 59). Defendant believes that he should have received a two- to four-level  
7 downward departure for his mitigating role, pursuant to U.S.S.G. § 3B1.2.  
8 Defendant asserts his counsel was deficient in his pursuit of this sentencing  
9 adjustment.

10 Defendant’s counsel argued at sentencing for this exact departure in two  
11 separate memoranda (Ct. Recs. 48, 52). Counsel was adamant that Defendant was  
12 merely a middle man in the operation and lacked knowledge of the scope and  
13 structure of the underlying criminal enterprise. *See id.* As the sentencing  
14 guidelines make clear, “the court, in weighing the totality of the circumstances, is  
15 not required to find, based solely on the defendant’s assertion, that such a role  
16 adjustment is warranted.” U.S.S.G. § 3B1.2, comment n.3(c). Defendant had  
17 engaged in multiple transactions over a three-month period, coordinated the sale of  
18 drugs for others, and was associated with a large amount of methamphetamine (Ct.  
19 Rec. 45). Defendant’s counsel made diligent efforts to reduce Defendant’s  
20 sentence for minor participation (Ct. Recs. 48, 52). Thus, even though Defendant’s  
21 counsel was unsuccessful in making these arguments, it does not amount to a  
22 deficient performance.

#### 23 **II. Downward Departure based on *Booker***

24 Defendant also contends that his sentence was imposed in excess of the  
25 maximum authorized by law (Ct. Rec. 59). Defendant asserts that recent case law  
26 justifies the Court vacating the sentence imposed and remanding for re-sentencing  
27 because Defendant’s mitigating circumstances were not adequately taken into  
28 consideration. *Id.*



1 In making his arguments, Defendant relies on two recent Supreme Court  
2 decisions that are inapplicable to his case, *Blakely v. Washington*, 542 U.S. 296  
3 (2004); and *United States v. Booker*, 125 S. Ct. 738 (2005). Both cases cannot be  
4 applied to Defendant's § 2255 motion. Courts have consistently held that neither  
5 *Blakely* nor *Booker* should be applied retroactively to cases on collateral review.  
6 *Schardt v. Payne*, 414 F.3d 1025, 1034 (9th Cir. 2005); *Cirilo-Munoz v. United*  
7 *States*, 404 F.3d 527, 533 (1st Cir. 2005); *Humphress v. United States*, 398 F.3d  
8 855, 860 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 480-81 (7th  
9 Cir. 2005); *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005).  
10 Furthermore, the Supreme Court specifically stated in *Booker* that its holdings  
11 apply "to all cases on direct review." 125 S. Ct. at 769. This statement evidences  
12 the Supreme Court's intent that *Booker* should not be applied retroactively to cases  
13 on collateral review. *See id.* Since *Booker* was not decided until January 12, 2005,  
14 and judgment was entered against Defendant on October 20, 2004, the application  
15 of *Booker* would be retroactive (Ct. Rec. 57); *Booker*, 125 S. Ct. at 738. *Booker* is  
16 inapplicable to Defendant's petition.

17 Moreover, although *Blakely* was decided prior to Defendant's sentencing  
18 hearing, Defendant cannot find relief from *Blakely*. (542 U.S. at 296). Defendant  
19 was sentenced under the Federal Sentencing Guidelines, a body of rules and  
20 criteria that *Blakely* does not touch. *See* 124 S. Ct. at 2538 n.9 (finding that "the  
21 Federal Guidelines are not before us, and we express no opinion on them").  
22 Consequently, these recent decisions have no bearing on Defendant's case.

23 For these reasons, Defendant has failed to prove that his counsel was  
24 deficient. Defendant is not entitled to any relief in the district court, and summary  
25 dismissal is proper.

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27  
28 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Petition to  
**ORDER DENYING MOTION TO MODIFY AND CORRECT SENTENCE**  
**PURSUANT TO TITLE 28 U.S.C. § 2255 \* 8**



1 Vacate, Set Aside, or Correct his Sentence in Federal Custody under 28 U.S.C.  
2 § 2255 (Ct. Rec. 42) is **DISMISSED**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
4 order, to provide copies to the Defendant, and **close** the file.

5 **DATED** this 31<sup>st</sup> day of October, 2005.

6  
7 s/ ROBERT H. WHALEY  
8 Chief United States District Judge  
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